EX. 9
APP. 095 - 097

Confidential
January 7, 2004

Mr. Keith L. Washington

Dear NFL Players Union,

I have been in the NFL and a part of the players union for nine years. I have been a big advocate of the NFL, Players Union, and fellow Players.

In October of 2002, I was served court papers by a Mr. Howard Silber, one of whom I have never met or had any business of any kind with. The court papers from Mr. Silber alleges I owe him 19,000 dollars. When I received these papers, I was being represented by one Mr. Steve Weinberg. When confronting Mr. Weinberg about these allegations concerning Mr. Silber, Mr. Weinberg assured me these allegations had nothing to do with me. Mr. Weinberg also strongly denied any wrong doing to Mr. Silber as well as insisting when I signed with him in 2000 having no dealings with Mr. Silber at all. I signed with Mr. Weinberg and Mr. Weinberg only in 2000. I continued with Mr. Weinberg's services until informed of his suspension by the Union. It was only until recently had the information about various conducts that were very detrimental to his clients began to become clear. Mr. Weinberg clearly had lied too and involved me as well as other players in his dispute with Mr. Silber. These actions within themselves clearly show, Mr. Weinberg is at fault for any actions taken upon his clients by Mr. Silber.

After Mr. Silber served me court papers in October 2002, Mr. Weinberg almost insisted I pay him (Mr. Weinberg) the remaining 9,000 dollars I owed him at the time I received these papers. Mr. Weinberg told me to quickly send the remaining balance of 9,000 dollars to Sports at Work a new avenue of his business. It was only until later, I found out it was only a scam to hide his money from Mr. Silber; Even still all my debt with Mr. Weinberg were settled. I also found out later, it was against NFL PA rules to persuade full payment before the end of the playing season. Never before had Mr. Weinberg urged me to pay in full before the post season. This action clearly shows Mr. Weinberg clearly was misleading me as his client. Mr.

Weinberg also showed up at our team hotel in Dallas on December 27, 2003 trying to persuade me to sign a paper stating; I only paid him early because that's how I handle my business and it was my reasons and mine only to pay him early. I found this paper pretty strange so I declined to sign it and asked if he would please leave my room.

Mr. Silbers' business with me is very clear, before being served papers by him; I never heard of him, Never talked to him, Never seen him, and Never had any business with him. At the time he had papers sent to me, I owed Mr. Weinberg only 9,000 dollars. Mr. Silber comes up with a sum of 19,000 dollars which is very wrong. I would appreciate it if Mr. Silber as well as Mr. Weinberg would leave me and my family out of their trash.

In closing, I would like to file a grievance against Mr. Weinberg as well as Mr. Silber. I have been going through this turmoil for absolutely no reason at all. If either Weinberg or Silber is ever allowed to represent anyone in our league again, it will be a great injustice to all players. Mr. Weinberg and Mr. Silber will clearly make a mockery of our Union if they are to ever represent again. I have been with this Union for nine years, Now I ask you be with me.

Thank you,

Keith L. Washington

BRIDGET M. WASHINGTON
KEITH L. WASHINGTON
972-263-2250
548 PARKVIEW DR.
GRAND PRAIRIE, TX 75052

CHECK HERE IF TAX DEDUCTIBLE ITEM ☐

$ 1576

10-7-02

Sports at Work Enterprises, Inc.

Five thousand six hundred twenty five + 00/100

BAL. FOR'D.
THIS PAYMENT 5625.00
BALANCE
OTHER
BAL. FOR'D.

Bank of America

ACH R/T 111000025

agent fees

For added security, the account number no longer appears on this copy.

[redacted]

1576 NOT NEGOTIABLE

BRIDGET M. WASHINGTON
KEITH L. WASHINGTON
972-263-2250
548 PARKVIEW DR.
GRAND PRAIRIE, TX 75052

CHECK HERE IF TAX DEDUCTIBLE ITEM ☐

$ 1592

10-28-02

Sports at Work Enterprises, Inc.

Five thousand six hundred twenty five + 00/100

BAL. FOR'D.
THIS PAYMENT 5625.00
BALANCE
OTHER
BAL. FOR'D.

Bank of America

ACH R/T 111000025

2nd agent payment

For added security, the account number no longer appears on this copy.

[redacted]

1592 NOT NEGOTIABLE

BRIDGET M. WASHINGTON
KEITH L. WASHINGTON
972-263-2250
548 PARKVIEW DR.
GRAND PRAIRIE, TX 75052

CHECK HERE IF TAX DEDUCTIBLE ITEM ☐

$ 1607

11-19-02

Sports at Work Enterprises, Inc.

Eleven thousand two hundred fifty + 00/100

BAL. FOR'D.
THIS PAYMENT 11,250.00
BALANCE
OTHER
BAL. FOR'D.

Bank of America

ACH R/T 111000025

Final payment '02 season

For added security, the account number no longer appears on this copy.

[redacted]

1607 NOT NEGOTIABLE

EX. 10
APP. 098 - 103

FILED
CLERK US DISTRICT COURT
MAR - 1 2006
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Priority
Send
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Closed
JS-5/JS-6
JS-2/JS-3
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SCANNED

ENTERED
CLERK, U.S. DISTRICT COURT
MAR - 2 2006
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In Re DAVID LAWRENCE DUNN NATIONAL FOOTBALL LEAGUE ASSOCIATION, INC. Plaintiff, v. DAVID LAWRENCE DUNN, Defendant.	SA CV 05-1000(RSWL) SA 03-11003 RA ORDER

Plaintiff National Football League Association's ("NFLPA") Motion for Summary Judgment and Defendant David

65

Dunn's Motion for a Continuance pursuant to Federal Rule of Civil Procedure 56(f) came on regularly for hearing on Monday, February 27, 2006. After having considered all of the papers and argument in the matter

SCANNED

THE COURT NOW FINDS AND RULES AS FOLLOWS:

First, this Court **DENIES** Defendant Dunn's 56(f) request and proceeds to determine NFLPA's pending request for Summary Judgment. This Court finds that purely legal questions are presented for this Court regarding the legal effect of Defendant-Debtor David Dunn's Contract Advisor certification with the National Football League Players' Association.

Second, as to Plaintiff NFLPA's Motion for Summary Judgment, this Court finds that no genuine issue of material fact exists making Summary Judgement appropriate; and therefore **GRANTS** the request. As to Plaintiff's Complaint for Declaratory Judgment, this Court finds as follows

(1) Section 9(a) of the National Labor Relations Act provides that the NFLPA's Collective Bargaining Agreement gives the NFLPA, as the exclusive bargaining representative of NFL players, sole discretion in choosing its agents. See White v. NFLPA, 92 F. Supp.

2d 918, 924 (D. Minn. 2000); Collins v. NBA Players Assn., 850 F. Supp. 1468, 1475 (D. Colo. 1991); and see H.A. Artists Assocs. v. Actors' Equity Assn., 451 U.S. 704 (1981).

(2) David Dunn and the NFLPA formed an executory contract. In re CFLC, Inc., 89 F.3d 673, 677 (9th Cir. 1996). Dunn applied to perform services for the NFLPA as a Contract Advisor by submitting his application, which serves as the offer to form the contract. The NFLPA accepted Dunn's offer to serve as a Contract Advisor by the terms of the application when it certified him. The consideration supporting the contract is Dunn's being allowed to serve as a Contract Advisor, representing the NFLPA on its behalf in salary negotiations between NFL clubs and NFL players, in exchange for Dunn's being bound by the NFLPA's regulations, including disciplinary procedures.

This Court finds that Dunn does not have, what he has characterized as, a license to pursue a profession, which is not governed by contract principles and obligations. Also, Dunn's compliance with the Agent Regulations was not conditioned on his performance of actually negotiating player contracts. Rather, while Dunn was under no obligation to actually negotiate NFL player salary contracts, as long as he retained the status of an NFLPA certified agent, he was bound to the standards expressed in the NFLPA Agent Regulations, including the disciplinary procedures. Noncompliance with the Agent Regulations including the disciplinary procedures effectively puts Dunn in breach of his agreement with the NFLPA.

(3) As an **executory contract**, pursuant to Section 365(c) of the bankruptcy code, Dunn **may not assign and may not assume** the Dunn Agreement without the consent of the NFLPA. But, this Court finds that it is precluded from compelling Dunn to reject the contract, as this falls within the clear discretion of the bankruptcy court.

(4) Finally, Section 362(a) of the bankruptcy code halts the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor . . .," which clearly includes the NFLPA's disciplinary proceedings against Dunn and any resulting arbitration.

Here, the NFLPA asks this Court to decide whether Dunn is entitled to continue to act as a Contract Advisor without the consent of the NFLPA and without complying with the NFLPA Regulations. Absent the imposition of the bankruptcy court's automatic stay, the answer to this question is no. Defendant Dunn must comply with his contract obligations and submit to the NFLPA's disciplinary proceedings.

SCANNED

But this case illustrates the fact that the exclusive rights of the NFLPA, as the sole collective bargaining representative of NFL players, are in direct conflict with the protections afforded a debtor in bankruptcy by way of the automatic stay. And, this Court must honor the imposition of the automatic stay as the controlling principle is that lifting or not lifting the stay is a discretionary matter for the bankruptcy court. See Sommax Industries, 907 F.2d 1280 (2d Cir. 1990).

However, this determination is uncomfortably at odds with the NFLPA's exclusive right to determine to whom it delegates its bargaining authority. Ultimately, the bankruptcy stay forces the NFLPA to retain Dunn's certification status complete with the rights and privileges afforded to NFLPA Contract Advisors, without requiring Dunn to submit to his contractual obligations, namely the NFLPA's Regulations and disciplinary proceedings. Most importantly, the NFLPA is forced to allow Dunn to act as an agent on its behalf and use its exclusive bargaining authority, even though the NFLPA clearly wishes to subject Dunn to its internal discipline procedures and potentially cease its relationship with him. Options, both of which would be available to it, if the stay was lifted. In essence the bankruptcy's automatic stay trumps and undermines the exclusive authority vested in the NFLPA through the National Labor Relations Act.

SCANNED

Therefore, this Court **GRANTS** Plaintiff National Football League Players' Associations' Motion for Summary Judgment and adopts Plaintiff's Statement of Uncontroverted Facts with modifications made by the Court.

IT IS SO ORDERED.

RONALD S.W. LEW

RONALD S.W. LEW
United States District Judge

DATED: 3-01-06

EX. 11
APP. 104 - 109

LEXSEE 2002 U.S. DIST. LEXIS 7420

GLENDA H. RUSHE, ET AL. VERSUS NMTC, INC. d/b/a MATCO TOOLS, ET AL.

CIVIL ACTION 01-3440 SECTION "T"(6)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2002 U.S. Dist. LEXIS 7420

April 16, 2002, Decided
April 16, 2002, Filed; April 17, 2002, Entered

DISPOSITION: [*1] Motion to Vacate Preliminary Default and Compel Arbitration and Stay Court Proceedings Pending Arbitration filed on behalf of the defendants, NMTC, Inc. d/b/a Matco Tools and Donald Hawkins, GRANTED.

COUNSEL: For GLENDA H RUSHE, JOHN R RUSHE, plaintiffs: Thomas Francis Weymann, Thomas F. Weymann & Associates, New Orleans, LA.

For NMTC INC, DONALD HAWKINS, defendants: Gerald James Huffman, Jr., David M. Whitaker, Lemle & Kelleher, LLP, New Orleans, LA.

For NMTC INC, DONALD HAWKINS, defendants: Scott M. Loomis, Richard P. Goddard, Calfee, Halter & Griswold, LLP, Cleveland, OH.

JUDGES: G. THOMAS PORTEOUS, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: G. THOMAS PORTEOUS, JR.

OPINION:

Before the Court is a Motion to Vacate Preliminary Default and Compel Arbitration and Stay Court Proceedings Pending Arbitration filed on behalf of the defendants, NMTC, Inc., d/b/a Matco Tools ("Matco") and Donald Hawkins (together, "defendants"). The parties waived oral argument and the matter was submitted for the Court's consideration on the briefs alone January 30, 2002. The Court, having considered the arguments of counsel, the Court record, the evidence submitted, the applicable law and jurisprudence, is fully [*2] advised in the premises and ready to rule.

ORDER AND REASONS

I. BACKGROUND:

Plaintiffs, John R. Rushe and Glenda H. Rushe, entered into a franchise agreement with NMTC, Inc. d/b/a Matco Tools on December 27, 1999. Matco is a Delaware corporation with its headquarters and principle place of business in Stow, Ohio. Matco is a manufacturer and distributor of professional quality mechanics' tools and service equipment. Plaintiffs filed this suit alleging various claims for breach of contract, fraudulent misrepresentations, negligence, unfair trade practices, and loss of consortium. Plaintiffs assert that misrepresentations were made with an intent to defraud them into believing a better business opportunity existed. Specifically, plaintiffs contend that they were solicited and induced in conversations and documents, including Matco's Uniform Franchise Offering Circular and Distributorship Agreement, that they would have an "exclusive territory" containing a "minimum of 375 potential customers." Mr. Rushe later found that 22 of the 93 mechanic's shops listed in his Agreement were closed. It was further learned that a majority of those still open had told Donald Hawkins, [*3] District Manager for Matco, that they would not allow Matco representatives to solicit business on their premises. Hawkins further induced plaintiffs with annual earnings projections in excess of $ 45,000.00.

Suit was filed in the Civil District Court for the Parish of Orleans, State of Louisiana, on October 5, 2001. Defendant, Matco, was personally served through it registered agent on October 18, 2001. A preliminary default was entered on November 6, 2001. Thereafter, a confirmation hearing was held on November 9, 2001, at which time Judge Bagneris directed plaintiffs to submit a Judgment for his signature. Prior to the entry of the Judgment, Matco removed the action to federal court on November 15, 2001; therefore, Judge Bagneris declined to enter the submitted Judgment. Matco simultaneously filed an answer to the petitioners' action in this Court.

II. ARGUMENTS OF THE RESPECTIVE PARTIES:

A. Arguments of the Defendants in Support of their Motion:

First, defendants request that this Court vacate the entry of preliminary default as defendants timely removed the proceedings to this Court pursuant to *28 U.S.C. § 1446*(b) and answered in accordance [*4] with Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 81(c). Plaintiffs were able to obtain a preliminary default order in State Court based upon the shorter fifteen (15) day responsive pleading deadline provided by Louisiana law. Defendants however assert that "good cause" exists for setting aside the entry of default pursuant to *Fed.R.Civ.P. 55(c)*.

Next, it is submitted that the Agreement entered into by the parties contained a broad dispute resolution provision including an expansive clause requiring that all breaches, claims, disputes, and controversies between the Distributor and Matco arising from the Agreement, including any allegations of fraud, misrepresentation, and violation of any federal, state, or local law or regulation, be decided by way of a specified dispute resolution procedure leading to final, binding arbitration. (Defendants' Exhibit A, § 12.1). Plaintiffs have raised claims that clearly are within the scope of the Agreement's binding arbitration provisions. As such, this Court should compel the parties to resolve this dispute according to the agreed upon procedure, including arbitration. Thus, these proceedings should be stayed pending said arbitration.

[*5] **B. Arguments of the Plaintiffs in Opposition to the Motion:**

The preliminary default was properly entered as Matco failed to timely file an answer pursuant to Louisiana law. Plaintiffs submit that Matco willfully allowed the default to occur as a tactical decision. Moreover, plaintiffs contend that a ruling to set aside the default would be financially and emotionally prejudicial to them. Finally, plaintiffs argue that no meritorious defense has been submitted. As such, plaintiffs contend that there is no good cause for setting aside the entry of default by the Civil District Court.

Next, plaintiffs argue that they should not be compelled to arbitrate their disputes as Louisiana law is applicable. It is asserted that misrepresentations were made concerning the number of potential customers in the Rushes' territory, as well as, the non-exclusive nature of the territory itself, which resulted in consent being vitiated at the time of the confection of the contract. Therefore, pursuant to Louisiana law, the agreement is void ab initio.

III. LAW AND ANALYSIS:

1. Entry of Preliminary Default

28 U.S.C. § 1446(b) allows a defendant thirty (30) [*6] days from the date of service to remove a case to federal court. When a case is removed to federal court, *Fed.R.Civ.P. 81(c)* provides that when a defendant has not answered prior to removal, an answer or other defenses or objections shall be filed within twenty (20) days after service or receipt of a copy of the initial pleading, or within five (5) days after the filing of the petition of removal, whichever is longer.

In this case, Matco was served with plaintiffs' petition on October 18, 2001, and filed a notice of removal on November 15, 2001, within the thirty (30) day removal period allowed by *28 U.S.C. § 1446*(b). As no answer had been filed in state court, but twenty (20) days had elapsed since service of the initial pleading, Matco had five (5) days after the filing of the notice of removal to answer, in accordance with *Fed.R.Civ.P. 81(c)*. Matco likewise timely complied with this provision as an answer was filed in federal court on November 15, 2001.

The wrinkle presented in this case, however, is that the plaintiffs had obtained a preliminary default order in state court prior to its removal. Louisiana Code of Civil Procedure Article 1001 provides fifteen [*7] (15) days for responsive pleadings. Our jurisprudence has made clear that the federal rules apply *after* removal and "neither add to nor abrogate what has been done in the state court prior to removal." *Butner v. Neustadter, 324 F.2d 783 (9th Cir. 1963)* (quoting *Talley v. American Bakeries Co., 15 F.R.D. 391, 392 (E.D. Tenn. 1954)*. "The federal court takes the case as it finds it on removal and treats everything that occurred in the state court as if it had taken place in federal court." Id. (citing *Savell v. Southern Ry., 93 F.2d 377, 379 (5th Cir. 1937)*. However, a motion to set aside the default may be asserted once the matter has been removed to federal court.

Fed.R.Civ.P. 55(c) provides that "for good cause shown" a court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b). The factors to be considered in making a Rule 55(c) determination include: (1) whether the default was willful; (2) whether setting aside the default would prejudice the adversary; and, (3) whether a meritorious defense is presented. See *CJC Holdings, Inc. v. Wright & Lato, Inc., 979 F.2d 60, 64 (5th Cir. 1992)*. [*8] *Rule 60(b) of the Federal Rules of Civil Procedure* sets forth the requirements for relief from a judgment or order as follows:

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one [*9] year after the judgment, order, or proceeding was entered or taken.

Rule 60(b) "must be equitably and liberally applied to achieve substantial justice." *Blois v. Friday, 612 F.2d 938 (5th Cir. 1980).* Accord, *Laguna Royalty Co. v. Marsh, 350 F.2d 817, 823 (5th Cir. 1965).* This rule, which allows the trial court to reopen a case, is:

> most liberally applied to default judgments; its main application is to those cases in which the true merits of a case might never be considered because of technical error, or fraud or concealment by the opposing party, or the court's inability to consider fresh evidence. (Citations omitted.) The purpose of the motion is to permit the trial judge to reconsider such matters so that he can correct obvious errors or injustices and so perhaps obviate the laborious process of appeal. Weighing against the grant of a 60(b) motion is the desirability of finality in judgments. This is particularly true where the reopening of a judgment could unfairly prejudice the opposing party. (Citation omitted). But [*10] even without such prejudice, the desirability of orderliness and predictability in the judicial process speaks for caution in the reopening of judgments. These are matters that are addressed to the sound discretion of the trial court, and its ruling . . . will be reversed on appeal only upon a showing of abuse of discretion. (Citations omitted).

In an opinion by Judge Morey Sear of this Court, he set forth the following guidelines for applying this rule:

Swift Chemical Co. v. Usamex Fertilizers, 490 F. Supp. 1343, 1349-1350 (E.D.La. 1980), affirmed *646 F.2d 1121 (5th Cir. 1981),* rehearing denied *650 F.2d 282 (5th*

Cir. 1981) (quoting *Fackelman v. Bell, 564 F.2d 734, 735-36 (5th Cir. 1977)).*

As such, even though the initial entry of preliminary default was proper in accordance with the State procedural rules, vacating that order is appropriate in this case considering the fact that the defendants answered the complaint within five days of removal to federal court, in accordance with *Fed.R.Civ.P. 81(c)* and securing that a default judgment was never entered. See, *Tarbell v. Jacobs, 856 F. Supp. 101 (N.D.N.Y. 1994).* This Court finds that good cause has been shown for setting aside the preliminary default entered [*11] in the State Court. Accordingly, this Court finds it proper to vacate the preliminary default entered in State Court pursuant to *Fed.R.Civ.P. 55(c)* and/or *60*(b).

2. Arbitration of claims against Matco

Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate a dispute unless the court determines the parties agreed to arbitrate the dispute in question. *AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986); Neal v. Hardee's Food Systems, Inc., 918 F.2d 34, 37 (5th Cir. 1990).* Determining whether the parties agreed to arbitrate the dispute in question involves two considerations: (1) whether a valid agreement to arbitrate between the parties exists; and, (2) whether the dispute in question falls within the scope of that arbitration agreement. *Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1065 (5th Cir. 1998).*

The Federal Arbitration Act ("FAA") applies to written arbitration provisions contained in contracts evidencing a transaction involving commerce, and its reach is coextensive with [*12] the Congressional power to regulate under the Commerce Clause. Section 2 of the FAA provides that a "written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. § 2.* The Supreme Court has stated that this section serves as a "congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983).* As such, arbitration should be required "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation" that would include the claims at issue. See, *Pennzoil, 139 F.3d at 1067* (quoting *Neal, 918 F.2d at 37).*

In this case, the Distributorship Agreement is "a contract evidencing a transaction involving interstate commerce." *9 U.S.C. § 2.* The contract is between Matco, a Delaware corporation [*13] with its principle place of business in Ohio, and the Rushes, who are Louisiana residents, whereby the Rushes' would act as distributors of Matco products. The tools and products of Matco would be provided to the Rushes from outside the State of Louisiana. Moreover, the claims and allegations of this suit involve meetings and communications which took place in or between Louisiana and Ohio.

Moreover, there is no dispute that there is a written arbitration provision in said Agreement. Specifically, Section 12.1 of the Distributorship Agreement provides:

> Except as expressly provided in Section 12.5 of this Agreement, all breaches, claims, disputes and controversies (collectively referred to as "breaches" or "breach") between the Distributor...and Matco, including its employees, agents, officers or directors...arising from or related to this Agreement, including any allegations of fraud, misrepresentation, and violation of any federal, state or local law or regulation, will be determined exclusively by binding Arbitration in accordance with the Rules and Regulations of the American Arbitration Association.

(Defendants' Exhibit A, § 12.1).

The Fifth Circuit has differentiated [*14] arbitration clauses which are "broad" and those that are "narrow." Where an arbitration clause is "broad," the action should be stayed and the arbitrator permitted to decide if the dispute falls within the clause. Whereas in cases where the clause is "narrow," the case is not referred to arbitration or stayed, unless the Court determines that the dispute falls within the clause. *In re Complaint of Hornbeck Offshore Corp., 981 F.2d 752 (5th Cir. 1993).* "Narrow" arbitration clauses are those which only require arbitration of disputes "arising out of" the contract, whereas "broad" arbitration clauses govern disputes which "relate to" or "are connected with" the contract. See, *Pennzoil, supra.* Additionally, clauses which contain the "any dispute" language are considered to be "broad". Id.; *Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996)* ("any other dispute" was sufficiently broad). In this case, the arbitration agreement refers to **"all breaches, claims, disputes and controversies...arising from or related to this Agreement, including any allegations of fraud, misrepresentation, and violation of any federal, state, or local** [*15] **law or regulation..."** (Defendants' Exhibit A, § 12.1) (emphasis added). This Court finds that this is a sufficiently "broad" arbitration clause. It applies to **all** claims **arising from or related to** the Agreement, including **any** of the enumerated allegations.

The plaintiffs have asserted claims for breach of the Agreement, misrepresentations, unfair trade practices, negligence, and loss of consortium. These claims fall within the scope of the "broad" arbitration provision over "all breaches, claims, disputes and controversies...including any allegations of fraud, misrepresentation, and violation of any federal, state, or local law or regulation." (Defendants' Exhibit A, § 12.1).

As such, it is the opinion of this Court that this Agreement falls within the scope of the FAA and pursuant to Section 2, said arbitration provision is "valid, irrevocable, and enforceable." *9 U.S.C. § 2.* Moreover, it is clear to this Court that (1) a valid agreement to arbitrate existed between the parties, and (2) that the dispute in question falls within the scope of that arbitration. See, *Pennzoil, supra.*

The plaintiffs have argued that it [*16] should not however be compelled to arbitration as Louisiana law is applicable relying on *Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996), George Engine Co., Inc. v. Southern Shipbldg. Corp., 350 So.2d 881 (La. 1977),* and *Sun Drilling Products Corp. v. Rayborn, 703 So.2d 818, 819 (La. App. 4 Cir. 1997).* This Court, however, is not in agreement with plaintiffs' position. In George Engine, the plaintiff, as in this case, alleged that the agreement entered into, containing a "broad" arbitration provision, was void ab initio as a result of misrepresentation of material facts constituting error in the principal cause. *George Engine, supra.* In that case, the Louisiana Supreme Court declined to follow *Prima Paint Corp. v. Flood & Conklin Mfg.Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)* and held that it had jurisdiction to determine whether or not the contract was valid under Louisiana law. *George Engine, supra.* In George Engine, the Louisiana Supreme Court explained that it was interpreting the Louisiana Arbitration Act [*17] § § 4201, 4203, not the FAA; therefore, it found that the legislative intent of these provisions was that an arbitration agreement should be enforced by the courts, unless the court, not the arbitrator, finds grounds at law or in equity for the revocation of the contract. Id.

In Sun Drilling, the Court was asked to determine whether fraud in the inducement of a contract containing a mandatory arbitration clause was to be decided by the state court, rather than an arbitrator, where the contract was subject to the FAA. *Sun Drilling, supra.* The Court, while suggesting that the Supreme Court of Louisiana may want to revisit its ruling in George Engine, stated that it was still the policy of the State and was therefore compelled to affirm the ruling of the lower court. id. The Court further relied on Doctor's Associates, for the proposition that applicable state law contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening Section 2 of the FAA. Id.

This Court, however, is guided by the FAA and the body of jurisprudence flowing from the federal courts including Prima Paint [*18] Corp.. In Prima Paint Corp., the United States Supreme Court specifically held that under the FAA, the issue of fraud in the inducement of a contract generally must be submitted to arbitration when the contract contains an arbitration clause providing for reference of any controversy or claim arising out of or relating to an agreement or breach thereof, in the absence of evidence that the contracting parties intended to withhold that issue from arbitration. *Prima Paint Corp., supra.* Whereas, if the claim is fraud in the inducement of the arbitration clause itself, an issue which goes to the making of the agreement to arbitrate, the federal court may proceed to adjudicate it. Id.

Moreover, this Court finds that the case of Doctor's Associates, is consistent with Prima Paint Corp. and this Court's opinion herein. In that case, the Court relying on its finding from the case of *Perry v. Thomas, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987)* did state that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate *arbitration agreements* without contravening § 2." *Doctor's Associates, 517 U.S. at 687, 116 S. Ct. at 1656* [*19] (emphasis added). In that case, the issue of the validity of the entire contract was not at issue, but instead, only the validity of the arbitration agreement based upon a state law which required that notice that a contract is subject to arbitration be typed in underlined, capitalized letters on the first page of the contract. Id. The state law further provided that if said notice was not provided the contract may not be subject to arbitration. The Supreme Court ruled that this particular state law "placed arbitration agreements in a class apart from 'any contract,' and singularly limits their validity" and therefore federal law preempted this state law. *Doctor's Associates, 517 U.S. at 689, 116 S. Ct. at 1657.*

In response to this motion, the plaintiffs contend that the Agreement is invalid as a whole based upon the misrepresentations made. n1 However, at no time have the plaintiffs asserted that there was fraud in the inducement relative to the arbitration clause alone, nor has there been allegations that the arbitration clause is invalid based upon general contract defenses under state law. As the fraud in the inducement relates to the contract *generally* [*20] , the jurisprudence dictates that this issue may be resolved by the arbitrator. Moreover, it is the finding of this Court that there is no evidence that the parties intended to withhold the matters submitted in this litigation from arbitration, especially in light of the "broad" arbitration clause which expressly includes claims of "fraud, misrepresentation, and violation of any federal, state, or local law or regulation." (Defendants' Exhibit A, § 12.1).

n1 The Court notes that there is no assertion that the Agreement should be rescinded in the Complaint. The plaintiffs merely assert claims for breach of contract, misrepresentation, unfair trade practices, negligence, and loss of consortium.

When the parties agree in writing to arbitrate their disputes, Section 3 of the FAA requires courts to stay proceedings that are referable to arbitration as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing [*21] for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. Having found a valid and enforceable agreement to arbitrate, the parties are hereby compelled to arbitrate the issues presented in this suit and this Court shall stay these proceedings pending said arbitration.

3. Arbitration of claims against Hawkins

Having found that the claims against Matco are subject to arbitration, this Court must consider whether the claims asserted against Hawkins are likewise subject to arbitration. A review of the relevant jurisprudence shows that claims by or against agents, employees, financing entities, guarantors, and closely related companies be arbitrated pursuant to related arbitration agreements entered by the signatory affiliates. In *Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185 (9th Cir. 1986),* [*22] an investor filed suit against the broker and its employees. The Court held that the broker's employees, who were non-signatories to the brokerage agreement could be bound by the agreement's arbitration clause. Id. Following Letizia, the Sixth Circuit in *Arnold v. Arnold Corporation, 920 F.2d 1269 (6th Cir. 1990)* found that the language of the arbitration agreement indicated that the parties' basic intent was to provide a single arbitral forum to resolve all disputes arising under the agreement. As all of the alleged wrongful acts of the non-signatory defendants related to their behavior as the officers and directors or in their capacities as agents of the signatory defendant, the entire dispute was to be arbitrated including the individual defendants as agents. Id. See also, *Eureka Homestead Society v. Howard, Weil, Labouisse, Frederichs Inc., 1994 WL 583274 (E.D.La. 1994)* (compelling arbitration of claims against non-signatory employees).

Moreover, the arbitration provision specifically includes "all breaches, claims, disputes and controversies...between the Distributor...and Matco, **including its employees, agents, officers or directors.** [*23] .." (Defendants' Exhibit A, § 12.1) (emphasis added). The claims asserted by the plaintiffs against Hawkins arise out of his serving as District Manager for Matco. As such, the parties are likewise compelled to arbitrate the claims against the non-signatory defendant, Hawkins.

Accordingly,

IT IS ORDERED that the Motion to Vacate Preliminary Default and Compel Arbitration and Stay Court Proceedings Pending Arbitration filed on behalf of the defendants, NMTC, Inc. d/b/a Matco Tools and Donald Hawkins, be and the same is hereby **GRANTED.**

IT IS FURTHER ORDERED that the Clerk of Court mark this action closed for statistical purposes, and,

IT IS FURTHER ORDERED that the Court shall retain jurisdiction and that the case shall be restored to the trial docket and shall be reset by order of this Court upon motion of a party if circumstances change, so that the case may proceed to final disposition. This order shall not prejudice the rights of the parties to this litigation.

New Orleans, Louisiana, this 16th day of April, 2002.

G. THOMAS PORTEOUS, JR.

UNITED STATES DISTRICT JUDGE

EX. 12
APP. 110

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ALAN D. STRASSER
[illegible]
(202) [illegible]

August 4, 2004

VIA FEDEX PRIORITY OVERNIGHT

Roger P. Kaplan
Arbitrator
211 N Union St Ste 100
Alexandria VA 22314

Re: *NFLPA v. Weinberg*, No. 94-D3

Dear Mr. Kaplan:

I have enclosed another subpoena for your signature in this case. I would appreciate your signing it and returning it to me in the enclosed prepaid FedEx envelope. I will ensure that the subpoena is served.

We have not requested as yet that you schedule a hearing on this discipline matter. We are interested to receive first the responses to our discovery requests and will ask that you schedule a hearing on this matter once we have reviewed them. I will send you a separate letter concerning the scheduling of the hearings regarding other grievances.

Sincerely,

Alan D. Strasser

Alan D. Strasser

dws

Enclosures

03-90722.1

EX. 13
APP. 111 - 119

Briefs and Other Related Documents

Skyleasing, LLC v. Tejas Avco Inc.Tex.App.-Houston [14 Dist.],2006.Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.**MEMORANDUM OPINION**

Court of Appeals of Texas,Houston (14th Dist.).

SKYLEASING, LLC, Appellant

v.

TEJAS AVCO INC., d/b/a Houston Southwest Airport, Appellee.

No. 14-05-00212-CV.

Aug. 10, 2006.

Background: Airport that leased space and provided fuel to lessee and company owning airplanes stored in leased facility brought claim against lessee and guarantor alleging breach of lease, and also against the airplane company, asserting a quantum meruit claim for the value of fuel and storage services. Airport also requested a temporary injunction to prevent the transfer or sale of any planes. Airplane company filed counterclaim against airport asserting various claims arising from the airport's liens and seeking a temporary injunction to dissolve all liens. The 240th District Court, Fort Bend County, granted the airport's request for an injunction, and denied airplane company's request. After airport entered into compelled arbitration with lessee and guarantor, airplane company moved to compel arbitration under the doctrine of equitable estoppel. The District Court denied the motion and severed the claims. Airplane company brought interlocutory appeal.

Holdings: The Court of Appeals, Charles W. Seymore, J., held that:

(1) airport did not need to rely on the terms of its lease with lessee in order to recover from airplane company, and

(2) airport did not raise allegations of substantially interdependent and concerted conduct between lessee and airplane company.

Affirmed.

[1] **Alternative Dispute Resolution 25T 182(1)**

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) k. In General. Most Cited Cases

Airport did not need to rely on the terms of its lease with lessee in order to recover monetary damages on a quantum meruit claim against company that owned airplanes stored in the leased facilities, as would allow airplane company, a non-signatory to the lease containing an arbitration clause, to compel arbitration with airport under the doctrine of equitable estoppel; although airport attached a ledger to its petition showing fuel charges at prices specified in the lease, it did not refer to the ledger when requesting money damages, but pled for the reasonable value of the services.

[2] **Alternative Dispute Resolution 25T 182(1)**

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) k. In General. Most Cited Cases

Airport did not raise allegations of substantially interdependent and concerted conduct between lessee and the company that owned airplanes stored in the leased facilities, as would allow airplane company, a non-signatory to the lease containing an arbitration clause, to compel arbitration of the airport's quantum meruit claim against it under the doctrine of equitable estoppel, although the airport's allegations against lessee and company both stemmed from unpaid fuel and storage services; the facts needed to prevail on breach of lease claim against lessee were distinct from those needed to prevail on claim against company.

On Appeal from the 240th District Court, Fort Bend County, Texas, Trial Court Cause No. 04-CV-139830.

David E. Jenkins, William S. Helfand and Barbara E. Roberts, for SkyLeasing LLC.
George Andrew Coats, for Tejas Avco Inc.
Martin R. Nathan, for Ads Aviation Inc., and Charles Cohen.

Panel consists of Justices HUDSON, FROST, and SEYMORE.

MEMORANDUM OPINION

CHARLES W. SEYMORE, Justice.

*1 Appellant, Skyleasing, L.L.C., appeals from an order denying its motion to compel arbitration of its underlying dispute with appellee, Tejas Avco Inc. d/b/a Houston Southwest Airport ("the Airport"). Although Skyleasing and the Airport have no agreement to arbitrate, Skyleasing contends that the trial court abused its discretion by refusing to apply the equitable estoppel doctrine to compel arbitration. We affirm.

I. BACKGROUND

The Airport leased space at its facility to ADS Aviation, Inc. ("ADS") pursuant to a written lease. Charles Cohen, president of ADS, guaranteed performance of ADS's obligations under the lease. The lease provided that the Airport would sell fuel to ADS at "flight school" prices. The lease also authorized ADS to sublease hangar space. ADS entered into a separate agreement with Skyleasing whereby ADS housed airplanes owned by Skyleasing at the Airport's facility. Skyleasing had no contract with the Airport. However, at ADS's request, the Airport provided fuel for the airplanes.

The Airport eventually declared a default on the lease. Allegedly, ADS failed to make all the lease and fuel payments. The Airport also filed "Mechanic's and Materialman's" liens on the planes owned by Skyleasing. In response, Skyleasing filed a "Motion for Judicial Review of Documentation Purporting to Create a Lien" contending the document purporting to create a lien on one plane is fraudulent.

The Airport then filed suit against ADS, Cohen, and Skyleasing.[FN1] In its live petition, the Airport alleges ADS and Cohen breached the lease by failing to make lease and fuel payments. The Airport asserts a quantum meruit claim against Skyleasing for the reasonable value of the fuel and storage services provided to its planes. The Airport also requested a temporary injunction to prevent ADS and Skyleasing from transferring or selling the planes. Apparently, Skyleasing was in the process of selling some of the planes when the Airport filed suit. The trial court consolidated Skyleasing's "Motion for Judicial Review of Documentation Purporting to Create a Lien" with the Airport's suit.

> FN1. The Airport also sued "Houston Skyline Aviation, L.P." alleging it owned some planes stored at the facility, but there is no indication Houston Skyline Aviation, L.P. has appeared in the suit.

Skyleasing filed a counterclaim against the Airport, an officer of the Airport, and an employee of the Airport, alleging slander of title, fraudulent lien, tortious interference with prospective business relations, and conspiracy. Skyleasing contends the Airport's allegedly improper lien interfered with Skyleasing's prospective sale of one airplane. Skyleasing requested a temporary injunction dissolving all liens and also seeks monetary damages. Skyleasing also filed a cross claim against ADS seeking "contribution" to the extent Skyleasing is ultimately found liable to the Airport for any charges.

Subsequently, the trial court granted the temporary injunction requested by the Airport and prohibited ADS and Skyleasing from transferring or selling the planes. The trial court denied the temporary injunction requested by Skyleasing.

*2 The lease contains a provision requiring arbitration of "any controversy or claim between the parties hereto relating to this lease, including, without limitation, any claim based on or arising from an alleged tort." Therefore, the Airport, ADS, and Cohen agreed to arbitrate their dispute, and the trial court signed an order compelling arbitration. Skyleasing then filed a motion to compel arbitration of its dispute with the Airport. Although Skyleasing is not a party to the lease, it sought to compel arbitration under the equitable estoppel doctrine. The trial court denied Skyleasing's motion and severed the Airport's claims against ADS and Cohen from this case. Skyleasing filed this interlocutory appeal from the order denying its motion to compel arbitration.[FN2]

FN2. See Tex. Civ. Prac. & Rem.Code Ann. § 171.098(a)(1) (Vernon 2005) (authorizing interlocutory appeal from order denying motion to compel arbitration under the Texas Arbitration Act).

II. EQUITABLE ESTOPPEL DOCTRINE

Apparently, all parties agree the Texas Arbitration Act ("TAA") governs Skyleasing's motion to compel arbitration. Under the TAA, a court shall order the parties to arbitrate if the party seeking to compel arbitration proves (1) a valid, enforceable agreement to arbitrate exists, and (2) the claims asserted fall within the scope of the agreement. *Valero Energy Corp. v. Teco Pipeline Co.,* 2 S.W.3d 576, 581 (Tex.App.-Houston [14th Dist.] 1999, no pet.); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 171.021(a) (Vernon 2005). The Airport and Skyleasing have no agreement to arbitrate. Skyleasing is not a party to the lease between the Airport and ADS, and the Airport and Skyleasing have no other contractual relationship. Nevertheless, in its sole issue, Skyleasing contends it is entitled to compel arbitration under the doctrine of equitable estoppel.

Although arbitration is encouraged, it is a contractual matter, and in the absence of an agreement to arbitrate, a party cannot be forced to forfeit the constitutional protections of the judicial system and submit its dispute to arbitration. *Jenkens & Gilchrist v. Riggs,* 87 S.W.3d 198, 201 (Tex.App.-Dallas 2002, no pet.); *see In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 737-38 (Tex.2005); *Freis v. Canales,* 877 S.W.2d 283, 284 (Tex.1994). However, Texas appellate courts have adopted the equitable estoppel doctrine espoused by the Fifth Circuit in *Grigson v. Creative Artists Agency, L.L.C.* 210 F.3d 524 (5th Cir.2000); *see Brown v. Anderson,* 102 S.W.3d 245, 249 (Tex.App.-Beaumont 2003, pet. denied); *In re EGL Eagle Global Logistics, L.P.,* 89 S.W.3d 761, 764-65 (Tex.App.-Houston [1st Dist.] 2002, orig. proceeding [mand. denied]); *McMillan v. Computer Translation Sys. & Support,* 66 S.W.3d 477, 482 (Tex.App.-Dallas 2001, orig. proceeding); *Tex. Enters., Inc. v. Arnold Oil Co.,* 59 S.W.3d 244, 249 (Tex.App.-San Antonio 2001, orig. proceeding). Under this doctrine, a non-signatory to a contract containing an arbitration clause may compel arbitration of a signatory's claims in two "limited" circumstances: (1) when the signatory must rely on the terms of the contract in asserting its claims against the non-signatory; or (2) when the signatory raises allegations of "substantially interdependent and concerted misconduct" by both the non-signatory and a signatory. *Grigson,* 210 F.3d at 526-27.[FN3] This doctrine is based on the principle that a signatory to a contract containing an arbitration clause cannot "have it both ways": it cannot seek to hold a non-signatory liable pursuant to duties imposed by the contract but refuse to arbitrate because the defendant is a non-signatory. *Id.*

FN3. The Texas Supreme Court recently acknowledged the equitable estoppel doctrine and *Grigson* in situations where a non-signatory sought to compel arbitration of a signatory's claims, but the court did not apply the two-pronged test outlined in *Grigson. iSee In re Palm Harbor Homes, Inc.,* 49 Tex. Sup.Ct. J. 711, 2006 WL 1562546, at *3-4 (Tex. June 9, 2006) (citing *Grigson* and the equitable estoppel theory but allowing non-signatory to compel arbitration of signatory's claims because the arbitration agreement provided that it inured to the benefit of the non-signatory); *In re Vesta Ins. Group, Inc.,* 192 S.W.3d 759, 760-61 (Tex.2006) (per curiam) (acknowledging *Grigson* in a but deciding plaintiff signatory was estopped to oppose arbitration of its tortious interference claim against non-signatories because each non-signatory was a current or former owner, officer, agent, or affiliate of the signatory with whom the plaintiff had an arbitration agreement). However, Texas appellate courts have adopted the *Grigson* test, and Skyleasing urges application of that test.

***3** Whether to utilize the equitable estoppel doctrine to compel arbitration is within the trial court's discretion, and we review its decision only for abuse of discretion. *See id. Meyer v. WMCO-GP, L.L.C.,* 126 S.W.3d 313, 317 (Tex.App.-Beaumont 2004, pet. granted); *Tex. Enters., Inc.,* 59 S.W.3d at 249. We may reverse a trial court for abuse of discretion only when it acted in an "arbitrary or unreasonable" manner or "without reference to any guiding rules and principles." *See Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex.1985); *Mosk v. Thomas,* 183 S.W.3d 691, 696 (Tex.App.-Houston [14th Dist.] 2003, no pet.). We may not reverse for abuse of discretion merely because we disagree with the trial court's decision if it was within the trial court's discretionary authority. *Beaumont*

Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex.1991); *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 293 (Tex.App.-Houston [14th Dist.] 2002, no pet.); *see Downer*, 701 S.W.2d at 242.

III. APPLICATION OF *GRIGSON*

Skyleasing contends the trial court abused its discretion by refusing to compel arbitration because one or both prongs of *Grigson* are satisfied. Preliminarily, we must clarify what claims we consider when evaluating whether the equitable estoppel doctrine applies here. The record indicates that the remaining dispute in this case consists of the following: the Airport's claims against Skyleasing; Skyleasing's counterclaim against the Airport and an officer and an employee of the Airport; Skyleasing's cross-claim against ADS; and Skyleasing's "Motion for Judicial Review of Documentation Purporting to Create a Lien." [FN4] Skyleasing's appellate briefs and motion to compel arbitration are not clear as to whether it seeks to compel arbitration of only the Airport's claims against Skyleasing or the entire dispute.[FN5]

FN4. As far as we can determine from the record, all these claims remained pending in this case after the dispute between the Airport and ADS and Cohen was severed.

FN5. At some points in its appellate briefs, Skyleasing seems to request that we compel arbitration of only the Airport's claims against Skyleasing; but at other points, it requests that we compel arbitration of the "dispute." Similarly, at one point in its motion to compel arbitration, Skyleasing seemed to request that the trial court compel arbitration of only the Airport's claims against Skyleasing; but it also prayed that the trial court compel arbitration of Skyleasing's counterclaim against the Airport and its cross-claim against ADS and argued these claims should not be severed from one another.

To the extent Skyleasing requests that we compel arbitration of the entire dispute or any part of the dispute besides the Airport's claims, Skyleasing has arguably waived its complaint. On appeal, Skyleasing argues only that the Airport's claims against Skyleasing satisfy the *Grigson* test. Skyleasing seems to presume that, if the Airport is equitably estopped to avoid arbitration of its own claims against Skyleasing, then it must be equitably estopped to avoid arbitration of the other claims. However, Skyleasing offers no argument or authority supporting a contention that the equitable estoppel doctrine would require arbitration of Skyleasing's counterclaim against the Airport,[FN6] Skyleasing's counterclaim against an officer and an employee of the Airport,[FN7] Skyleasing's cross-claim against ADS,[FN8] and Skyleasing's "Motion for Judicial Review of Documentation Purporting to Create a Lien." [FN9] Nonetheless, we conclude the trial court did not abuse its discretion by finding the Airport's claims against Skyleasing do not satisfy either prong of *Grigson*. Therefore, because the Airport has not invoked the equitable estoppel doctrine in the first place, we need not decide whether the doctrine would require arbitration of any of the other claims.

FN6. To the extent Skyleasing seeks to compel arbitration of its counterclaim against the Airport, it effectively asks us to expand the "limited" equitable estoppel exception such that a signatory whose own claims invoke the doctrine is also estopped to avoid arbitration of a counterclaim in certain instances. However, Skyleasing provides no argument or authority for determining under what parameters, if any, a signatory should be required to also arbitrate a counterclaim.

FN7. Skyleasing filed the counterclaim against the officer for his actions on behalf of the Airport *and* in his individual capacity and filed the counterclaim against the employee in her individual capacity. Skyleasing offers no argument or authority showing it is entitled to arbitrate a counterclaim for slander of title, fraudulent lien, tortious interference with prospective business relations, and conspiracy against parties, who, as individuals, are not even parties to the lease.

FN8. Skyleasing offers no argument or authority to show ADS should be required to arbitrate Skyleasing's claim against it when there is apparently no arbitration agreement between ADS and Skyleasing.

FN9. Before the Airport filed suit, Skyleasing filed the "Motion for Judicial Review of Documentation Purporting to

Create a Lien," which was consolidated with this suit. Skyleasing makes no argument as to how this motion should be treated when suggesting the "dispute" should be arbitrated.

A. Whether the Airport Must Rely on the Terms of the Lease in Asserting its Claims Against Skyleasing.

***4** [1] Skyleasing contends the first prong of *Grigson* is satisfied because the Airport must rely on the terms of its lease with ADS to assert its claims against Skyleasing. We disagree.

The Airport asserted two types of claims against Skyleasing: first, the Airport sought a temporary injunction to prevent Skyleasing from transferring ownership of the planes; and second, the Airport seeks monetary damages and attorneys' fees from Skyleasing under the theory of quantum meruit. The trial court granted some of the relief requested-the temporary injunction-before Skyleasing moved to compel arbitration. Therefore, only the quantum meruit claim was pending when Skyleasing moved to compel arbitration.[FN10] Accordingly, we will consider whether the Airport must rely on the lease to assert the quantum meruit claim against Skyleasing.[FN11]

FN10. Skyleasing has not requested that the trial court, or this court, dissolve the temporary injunction, so the entire dispute could be submitted to arbitration, if that were even possible. Moreover, the purpose of the injunction was to preserve the status quo, i.e. prevent Skyleasing from transferring the liened planes until the Airport's claim for monetary damages is resolved. Therefore, we will treat the quantum meruit claim as the only pending claim.

FN11. The Airport urges it need not rely on the terms of the lease because section 70.301 of the Texas Property Code allowed it to place liens on the planes absent a contractual relationship with Skyleasing. *See* Tex. Prop.Code Ann. § 70.301(a) (Vernon Supp.2006) (providing that one who "stores, fuels, repairs, or performs maintenance work on an aircraft has a lien on the aircraft for: (1) the amount due under a contract for the storage, fuel, repairs, or maintenance work; or (2) if no amount is specified by contract, the reasonable and usual compensation for the storage, fuel, repairs, or maintenance work."). The Airport has indeed filed liens on Skyleasing's planes pursuant to section 70.301. However, in its petition, the Airport mentioned the liens to support its request for a temporary injunction precluding Skyleasing from disposing of the planes. The Airport does not base its remaining claim for monetary damages on the liens; for example, it does not seek to foreclose, or otherwise enforce, the liens. Therefore, we need not decide whether section 70.301 allowed the Airport to place a lien on Skyleasing's planes absent a contractual relationship. Instead, we will consider only whether the Airport's remaining quantum meruit claim satisfies *Grigson*.

Quantum meruit is a remedy that is based on an implied agreement to pay for benefits rendered and knowingly accepted. *Kellogg,* 166 S.W.3d at 740; *Vortt Exploration Co. v. Chevron U.S.A., Inc.,* 787 S.W.2d 942, 944 (Tex.1990). "Quantum meruit is an equitable remedy which does not arise out of a contract, but is independent of it." *Vortt Exploration,* 787 S.W.2d at 944. A party may recover under quantum meruit only when there is no express contract covering the services or materials furnished. *Vortt Exploration,* 787 S.W.2d at 944; *see Kellogg,* 166 S.W.3d at 740. Thus, a claim for quantum meruit and a contract claim are "mutually exclusive." *Doctors Hosp.1997, L.P. v. Sambuca Houston, L.P.,* 154 S.W.3d 634, 637 n. 1 (Tex.App.Houston [14th Dist.] 2004, pet. abated); *see Kellogg,* 166 S.W.3d at 740; *Vortt Exploration,* 787 S.W.2d at 944. The Airport sues Skyleasing in quantum meruit because Skyleasing was not a party to the lease, and, therefore, the Airport cannot hold Skyleasing liable for the fuel and storage charges pursuant to the terms of the lease. In essence, the Airport pleads a claim against Skyleasing that eliminates the need to rely on a contract.

Skyleasing suggests that the Airport would have no claim against Skyleasing "but for" the existence of the lease because the Airport provided the storage services and fuel to Skyleasing's planes at ADS's request pursuant to the lease. However, since *Grigson,* the Fifth Circuit has clarified that the first prong is not satisfied simply because the signatory's claims against the non-signatory "touch matters" covered by the contract or "are dependent upon" the contract; instead, the signatory's claims must *rely* on the terms of the contract. *See Hill v. G.E. Power Sys.,* *Inc.*, 282 F.3d 343, 348-49 (5th Cir.2002) (citing *Grigson*, 210 F.3d at 527). Although the Airport might not have a claim against Skyleasing "but for" the existence of the lease, the Airport is not required to prove any terms of the lease to assert its quantum meruit claim against Skyleasing.

Finally, Skyleasing notes that the Airport attached to its petition ledger sheets showing fuel charges for the planes. Skyleasing states that these charges are based on the "flight school" prices specified in the lease. Thus, Skyleasing suggests the Airport must rely on the terms of the lease to assert its claim against Skyleasing because it seeks to recover the prices for fuel that were specified in the lease. The Airport's purpose in attaching the ledger sheets is not clear. However, the Airport refers to the ledger sheets when mentioning it placed liens on the planes for unpaid fuel and storage services. The Airport does not refer to the ledger sheets when requesting monetary damages from Skyleasing. Instead, the Airport pleads for the "reasonable value" of the services as allowed under the quantum meruit doctrine. *See Hudson v. Cooper*, 162 S.W.3d 685, 688 (Tex.App.-Houston [14th Dist.] 2005, no pet.) (recognizing measure of quantum meruit recovery is reasonable value of the services). Consequently, the Airport does not rely on the terms of the lease when seeking monetary damages from Skyleasing.

*5 In sum, the Airport need not, and cannot, rely on the terms of the lease to assert its quantum meruit claim against Skyleasing. Accordingly, we hold the trial court did not abuse its discretion by finding that the first *Grigson* prong is not satisfied.

B. Whether the Airport Raises Allegations of "Substantially Interdependent and Concerted Misconduct" by Both Skyleasing and ADS.

[2] Skyleasing contends the second *Grigson* prong is satisfied because the Airport raises allegations of "substantially interdependent and concerted misconduct" by Skyleasing and ADS. Whether this second prong is satisfied presents a more difficult question because the *Grigson* court did not define a precise standard for determining what constitutes "substantially interdependent and concerted misconduct," and Texas courts have not applied a uniform standard. Some Texas courts have suggested that this prong is satisfied if the allegations against a signatory and non-signatory are "based upon the same operative facts and are inherently inseparable." *See Brown*, 102 S.W.3d at 249-50; *Eagle Global Logistics*, 89 S.W.3d at 764-66.[FN12] Other Texas courts have found this prong satisfied based upon the allegations of the particular case without mentioning whether the allegations are "based upon the same operative facts and are inherently inseparable." *See McMillan v. Computer Translation Sys. & Support, Inc.*, 66 S.W.3d 477, 482-83 (Tex.App.Dallas 2001, orig. proceeding); *Universal Computer Consulting Holding, Inc. v. Hillcrest Ford Lincoln-Mercury, Inc.*, Nos. 14-04-00819-CV, 14-04-01103-CV, 2005 WL 2149508, at *8 (Tex.App.-Houston [14th Dist.] September 8, 2005, orig. proceeding).

> FN12. Prior to *Grigson*, this court required a signatory plaintiff to arbitrate if its claims against a non-signatory and a signatory defendant were "based on the same operative facts" and were "inherently inseparable"; however, in those cases, each non-signatory was an affiliate corporation, officer, or director of a signatory defendant, and the same claims were made against the non-signatory and the signatory defendant and/or the claims sounded in alter ego. *See In re Educ. Mgmt. Corp., Inc.*, 14 S.W.3d 418, 424-25 (Tex.App.-Houston [14th Dist.] 2000, orig. proceeding); *Valero Energy Corp.*, 2 S.W.3d at 593. However, since *Grigson*, at least one court has held that there need not be a corporate, agency, or employment relationship between the non-signatory and defendant signatory for the non-signatory to compel arbitration although such a relationship may be a factor for a court to consider when determining whether the claims are "inherently inseparable." *See Eagle Global Logistics*, 89 S.W.3d at 765-66.

We do not read the terms, "substantially interdependent and concerted misconduct" and "based upon the same operative facts and are inherently inseparable" as necessarily synonymous although some courts seem to use them interchangeably. *See Brown*, 102 S.W.3d at 249-50; *Eagle Global Logistics*, 89 S.W.3d at 764-66. Nevertheless, here, Skyleasing suggests the Airport's allegations against ADS and Skyleasing are "based upon the same operative facts and are inherently inseparable." Regardless of how Texas courts have interpreted this second *Grigson* prong, Skyleasing does not cite, and we have not found, a case in which the prong was satisfied under facts substantially similar to this case.

Skyleasing relies heavily on *Eagle Global Logistics.* In that case, the plaintiff sued a former employee for breach of contract, theft of trade secrets and confidential information, tortious interference with business relationships, and civil conspiracy. *Eagle Global Logistics,* 89 S.W.3d at 763-64. The plaintiff alleged that the employee violated his employment contract by disclosing the plaintiff's trade secrets and confidential information to his new employer and soliciting the plaintiff's customers. *See id.* The plaintiff also sued the new employer and several related parties for theft of trade secrets and confidential information, tortious interference with business relationships, and civil conspiracy. *Id.* The court of appeals held that the plaintiff was required to arbitrate its claims against the new employer and its related parties although they were not parties to the contract between the plaintiff and the employee which contained the arbitration agreement. *See id.* at 764-66. The court found that the plaintiff alleged "substantially interdependent and concerted misconduct" by all the defendants. *See id.* The court emphasized that the plaintiff alleged claims jointly "against all defendants" and alleged "concerted, coordinated acts" by all the defendants. *Id.* at 765.[FN13] In fact, courts have been quick to find the second *Grigson* prong satisfied when a signatory makes claims against a signatory and a non-signatory collectively and/or alleges some type of joint conduct.[FN14]

FN13. With respect to the cause of action for theft of trade secrets and confidential information, the plaintiff alleged the new employer and its related entities "*assisted, ratified, and benefitted* " from the employee's misconduct by utilizing and profiting from his theft of confidential information. *Eagle Global Logistics,* 89 S.W.3d at 765 (Emphasis in original). With respect to the cause of action for civil conspiracy, the plaintiff alleged that all the defendants "secretly *conspired, agreed, and endeavored* to deprive" the plaintiff of confidential information, current and prospective business, and business goodwill. *Id.* (Emphasis in original).

FN14. *See, e.g., Hill,* 282 F.3d at 349 (plaintiff signatory alleged non-signatory and defendant signatory "worked in tandem" to misappropriate trade secrets and fraudulently induce plaintiff to contract with them); *Jureczki v. Banc One Texas, N.A.,* 252 F.Supp.2d 368, 375-78 (S.D.Tex.2003), *aff'd,* 75 Fed. Appx. 272 (5th Cir.2003) (plaintiff signatories made factual and legal allegations against nonsignatories and signatories collectively as "defendants," and allegation that all defendants acted in concert to defraud plaintiffs was at the heart of all the claims); *Brown,* 102 S.W.3d at 249-50 (plaintiff signatory alleged signatory corporation breached their contract and four non-signatory officers of the corporation committed fraud and negligent misrepresentation by representing corporation was able to perform the contract; one officer executed the contract on behalf of the corporation and the plaintiff "lumps" all four officers together with regard to the fraud and negligent misrepresentation allegations); *Universal Computer,* 2005 WL 2149508, at *8 (plaintiff signatory asserted all legal causes of action against the defendants collectively and asserted no independent legal causes of action or factual allegations against non-signatories).

*6 In contrast, the Airport does not allege any joint and concerted conduct by ADS and Skyleasing, such that the claims against ADS and Skyleasing cannot be resolved separately; there is no allegation that they somehow conspired or otherwise joined in an effort to use the Airport's hangars and fuel without paying for the services.[FN15] Moreover, the Airport has not alleged the same causes of action collectively against ADS and Skyleasing.[FN16]

FN15. The Airport did plead that "Defendants" are attempting to sell the planes to support its request for a temporary injunction. However, the Airport has not asserted any joint conduct with respect to its claims for monetary damages.

FN16. As Skyleasing notes, the Airport seems to plead for attorneys' fees against ADS and Skyleasing collectively because it "seeks recovery of all its attorneys fees and expenses pursuant to the express terms of the lease, Tex. Civ. Prac. & Rem.Code § 38.001 et seq., and Texas Property Code § 70.301 *et. seq."* If read in isolation, this paragraph might support a conclusion that the Airport asserts interdependent claims against ADS and Skyleasing. However, a claim for attorneys' fees necessarily would be dependent upon the underlying cause of action. Because the Airport's underlying claim against ADS is breach of contract and its underlying claim against Skyleasing is quantum meruit, the Airport does not assert interdependent claims simply because it pleads for attorneys' fees against ADS and Skyleasing collectively.

Nonetheless, "[e]ach case, of course, turns on its facts." Grigson, 210 F.3d at 527. We acknowledge that, in the instant case, whether the allegations satisfy the second Grigson prong is a "close call." On the one hand, the Airport's allegations against ADS and Skyleasing both stem from same underlying fact-the Airport was not paid for storage services and fuel provided to Skyleasing's planes. The Airport alleges that ADS obtained the storage services and fuel pursuant to the lease. The Airport alleges Skyleasing benefitted from the storage services and fuel as owner of the planes. In short, the Airport seeks to hold both parties liable for the unpaid storage services and fuel.

On the other hand, the Airport asserts distinct theories of liability against each party and need not prove the same facts to support each theory. *See* Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 557 (Tex.2004) (recognizing breach-of-contract and quantum meruit claims have different elements of proof). To prevail on its breach-of-contract claim against ADS, the Airport must prove the following: (1) the existence of the lease; (2) the Airport performed or tendered performance under the lease; (3) ADS breached the lease; and (4) the Airport sustained damages as a result of ADS's breach. *See* Roof Sys., Inc. v. Johns Manville Corp., 130 S.W.3d 430, 442 (Tex.App.-Houston [14th Dist.] 2004, no pet.) (setting forth elements of breach-of-contract claim). To prevail on its quantum meruit claim against Skyleasing, the Airport must prove the following: (1) it rendered valuable services or furnished materials; (2) for Skyleasing; (3) Skyleasing accepted and enjoyed the services or materials; and (4) Skyleasing had reasonable notice that the Airport, in performing the services or providing the materials, expected payment. *See* Vortt Exploration, 787 S.W.2d at 944 (setting forth elements of quantum meruit claim).

Skyleasing contends it is not liable to the Airport because ADS-not Skyleasing-obtained the storage services and fuel. Although Skyleasing ultimately may defeat the quantum meruit claim on that basis, the Airport need not allege that ADS obtained the storage services and fuel to pursue a quantum meruit claim against Skyleasing as owner of the planes. *See id.* Thus, although the Airport's claims against ADS and Skyleasing stem from the same underlying fact, the law allows the Airport to assert independent claims against each party. Consequently, we cannot conclude the claims necessarily are "based upon the same operative facts and are inherently inseparable." FN17

FN17. We note that our evaluation of both *Grigson* prongs overlaps in this case. The fact that a breachof-contract claim and a quantum meruit claim are mutually exclusive, independent, and have different elements of proof, guides to a certain extent our conclusion that the claims against ADS and Skyleasing are not "based upon the same operative facts and ... inherently inseparable." However, equitable estoppel "is much more readily applicable" when both independent prongs are satisfied. Grigson, 210 F.3d at 527-28. Therefore, based on the particular circumstances of this case, we may be guided by overlapping considerations.

*7 Moreover, we are constrained by the abuse-of-discretion standard. *See* Grigson, 210 F.3d at 528; Meyer, 126 S.W.3d at 317; Tex. Enters., Inc., 59 S.W.3d at 249; *see also* Hill, 282 F.3d at 349 (recognizing that, when deciding whether to apply the *Grigson* equitable estoppel doctrine, "the district court is better equipped to make the call than this court, and we do not lightly override that discretion."); In re Weekley Homes, L.P., 180 S.W.3d 127, 134-35 (Tex.2005) (recognizing, albeit in opposite situation where signatory sought to compel arbitration of non-signatory's claims under direct-benefits estoppel, that "the equitable nature of the doctrine may render firm standards inappropriate, requiring trial courts to exercise some discretion based on the facts of each case."). Because Skyleasing does not cite a case finding "substantially interdependent and concerted misconduct" in a similar situation and this case does present a "close call," we cannot conclude the trial court acted in an "arbitrary or unreasonable" manner or "without reference to any guiding rules and principles" by finding the second *Grigson* prong is not satisfied. *See* Downer, 701 S.W.2d at 241-42.

Finally, "a party's right to litigate a dispute that the party has not agreed to arbitrate is at least as worthy of protection as a bargained-for right to arbitration." *Yazdani-Beioky v. Bhandara*, No. 14-00-01509-CV, 2001 WL 1429414, at *3, (Tex.App.-Hous. 14 Dist.] Nov.15, 2001, no pet.) (not designated for publication) (citing *Freis*, 877 S.W.2d at 284); *see Jenkens & Gilchrist*, 87 S.W.3d at 201. Because the "limited" circumstances warranting application of the equitable estoppel doctrine are not clearly satisfied here, we hold the trial court did not abuse its discretion by finding the Airport should not lose its right to litigate its dispute with Skyleasing-a complete stranger to the lease.

Accordingly, we overrule Skyleasing's sole issue and affirm the trial court's order denying Skyleasing's motion to compel arbitration.

Tex.App.-Houston [14 Dist.],2006.
Skyleasing, LLC v. Tejas Avco Inc.
Not Reported in S.W.3d, 2006 WL 2290852 (Tex.App.-Hous. (14 Dist.))

Briefs and Other Related Documents (Back to top)

- 2005 WL 2366416 (Appellate Brief) Reply Brief of Appellant, Skyleasing, L.L.C. (Jul. 18, 2005) Original Image of this Document with Appendix (PDF)
- 2005 WL 2011193 (Appellate Brief) Brief for Appellee Tejas Avco, Inc., d/b/a Houston Southwest Airport (Jun. 28, 2005) Original Image of this Document (PDF)
- 2005 WL 1198767 (Appellate Brief) Brief of Appellant, Skyleasing, L.L.C. (Apr. 29, 2005)
- 14-05-00212-CV (Docket) (Feb. 24, 2005)

END OF DOCUMENT

EX. 14
APP. 120 - 123

Briefs and Other Related Documents
Vaughn v. Leeds, Morelli & Brown, P.C.S.D.N.Y.,2005.Only the Westlaw citation is currently available.

United States District Court,S.D. New York.
Jeffrey S. VAUGHN, individually and on behalf of those class members similarly situated, Plaintiff,
v.
LEEDS, MORELLI & BROWN, P.C., Leeds, Morelli & Brown, L.L.P., Leeds & Morelli, Leeds, Morelli & Brown, Prudential Securities, Inc., Prudential Financial, Inc., Lenard Leeds, Steven A. Morelli, Jeffrey K. Brown, and John Does, James Vagnini, Frederic David Ostrove, Robert John Valli, Jr., Discrimination on Wall Street, Inc. and Discrimination on Wall Street Manhattan, Inc., and John Does, Esqs. 1-10 and Jane Does, Esqs., 1-10 a fictitious designation for presently and unknown licensed attorneys, professionals and/or unknown persons or entities, Defendants.
No. 04 Civ. 8391(DLC).

Aug. 12, 2005.

Blaine H. Bortnick, Jeffrey Liddle, Liddle & Robinson, L.L.P., New York, New York, for the Plaintiff.
Daniel T. Hughes, Kevin L. Spagnoli, Litchfield Cavo LLP, New York, New York, for Defendants Leeds, Morelli & Brown, P.C., Leeds, Morelli & Brown, L.L.P., Leeds & Morelli, Leeds, Morelli & Brown, Lenard Leeds, Steven A. Morelli, Jeffrey K. Brown, James Vagnini, Frederic David Ostrove, and Robert John Valli, Jr.
Gerard E. Harper, Theodore V. Wells, Jr., Beth S. Frank, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, New York, for Defendant Prudential Securities, Inc. and Prudential Financial, Inc.

OPINION AND ORDER

COTE, J.
*1 The plaintiff, Jeffrey S. Vaughn ("Vaughn"), has brought this putative class action against his employer and the lawyers he retained to represent him in an employment discrimination dispute against his employer, alleging that the settlement agreement that resolved the dispute (the "Agreement") was a product of secret collusion between his employer and his lawyers. The defendants have moved to dismiss this action and to compel arbitration, relying on an arbitration provision in the Agreement. Vaughn contends that the arbitration provision does not control, because the arbitration rules provided for in the Agreement do not permit class actions, and his lawyers are not parties to the Agreement. For the following reasons, the motion to compel arbitration is granted and the case is stayed until the resolution of the arbitration proceedings.

BACKGROUND

The following facts are taken from Vaughn's amended complaint unless otherwise noted. In 1998, Vaughn retained lawyers from Leeds, Morelli & Brown, P.C. (collectively "Leeds Defendants"), to assert employment discrimination claims against his employer, Prudential Securities Incorporated, for which Prudential Financial Inc. is a successor in interest (collectively "Prudential Defendants"). Vaughn pursued these claims through alternative dispute resolution procedures including mediation. The dispute between Vaughn and the Prudential Defendants produced the Agreement dated October 27, 1998. The Agreement, which is incorporated by reference in the Complaint and on which Vaughn has relied in part in bringing this action, granted the Prudential Defendants a general release of claims in exchange for $200,000.00. The Agreement also contains the following arbitration provision:

Any claim or controversy arising out of or related to this Agreement or the interpretation thereof will be settled by arbitration under the then prevailing constitution and rules of the New York Stock Exchange, Inc., or the National Association of Securities Dealers, Inc. Judgment based upon the decision of the arbitrators may be entered in any court having jurisdiction thereof. The governing law of this Agreement shall be the substantive and procedural law of the State of New York.

(Emphasis supplied.)

Vaughn alleges that the Leeds Defendants and Prudential Defendants had a "secret agreement" dated February 13, 1998 that was part of an employment discrimination dispute resolution system that the Leeds Defendants had established, and that would enable the Prudential Defendants to cap damages paid to various plaintiffs and settle numerous claims with plaintiffs represented by the Leeds Defendants at one time with a lump sum payment while providing direct payment of attorney's fees to the Leeds Defendants. Vaughn claims that he only learned of the existence of the secret agreement in or about October 2004. He initiated this action on October 25, 2004, and filed an amended complaint ("Complaint") on March 15, 2005.

***2** Vaughn has styled this action as a class action based on his allegation that hundreds of other Prudential employees with discrimination claims against the company were adversely affected by collusion between the Leeds Defendants and the Prudential Defendants based on this or other secret agreements. Vaughn asserts claims for common law fraud, conspiracy to defraud, aiding and abetting fraud, tortious interference with a contract, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of the Racketeer Influenced Corrupt Organization Act ("RICO").

The Prudential Defendants and the Leeds Defendants both have filed motions to dismiss or to compel arbitration. The Prudential Defendants contend that because the Agreement contains an arbitration provision, this matter should be referred to arbitration, and that this Court does not have subject matter jurisdiction because the only mechanism conferring federal question jurisdiction is the RICO claim, which the Prudential Defendants argue is time-barred and insufficiently pleaded. The Leeds Defendants advance similar arguments, and add, among other things, that the arbitration clause equitably estops Vaughn from pursuing his claims in federal court notwithstanding the fact that the Leeds Defendants are not parties to the Agreement. Vaughn argues among other things that because the arbitration rules provided for in the Agreement do not permit class actions, and he has styled his claim as a class action, this matter should not be referred to arbitration.

DISCUSSION

I. The Prudential Defendants

The FAA was designed to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 219 (1985). The FAA represents "a strong federal policy favoring arbitration as an alternative means of dispute resolution." *JLM Indus., Inc. v. Stolt-Nielsen SA,* 387 F.3d 163, 171 (2d Cir.2004) (citation omitted). Therefore, "under the FAA, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' " *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983)). The FAA requires that a contract provision to arbitrate disputes arising out of the contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Under the FAA, unless parties have unambiguously provided for an arbitrator to decide questions of arbitrability, it is for courts to decide whether the parties agreed to arbitrate. *Contec Corp. v. Remote Solution Co.,* 398 F.3d 205, 208 (2d Cir.2005). A court deciding a motion to compel arbitration must resolve four issues: (1) whether the parties agreed to arbitrate; (2) the scope of the agreement to arbitrate; (3) if federal statutory claims are asserted, whether Congress intended those claims to be nonarbitrable; and (4) if some, but not all, of the claims are arbitrable, whether to stay the balance of the proceedings pending arbitration. *JLM Indus.,* 387 F.3d at 169. In this case, the Prudential Defendants and Vaughn agree that all of Vaughn's claims are arbitrable and that Vaughn agreed to the arbitration provision. They merely dispute whether the scope of the arbitration provision includes claims styled as class actions.

***3** In the absence of "clear and unmistakable evidence to the contrary" in an arbitration clause, only in limited circumstances will a court "assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter." *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452 (2003) (citation omitted). "These limited instances typically involve matters of a kind that contracting parties would likely have expected a court to decide." *Id.* (citation omitted). "They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Id.* The question of whether arbitration clauses "forbid class arbitration ... does not fall into this narrow exception" because it involves "neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." *Id.* Thus, in a case where an arbitration clause provided that the parties "agreed to submit to the arbitrator '*[a]ll* disputes, claims, or controversies arising from or relating to this contract," ' the Supreme Court held that a dispute about whether the arbitration clause "forbids the use of class arbitration procedures ... is a dispute 'relating to this contract." ' *Id.* at 451 (emphasis in original). [FN1] In such a case, it was apparent that the parties "agreed that an arbitrator, not a judge, would answer the relevant question." *Id.* at 452.

FN1. In *Bazzle,* an issue was whether arbitration clause language providing that disputes "shall be resolved ... by one arbitrator selected by *us* [Green Tree] with consent of *you* [Green Tree's customer]" forbade class action arbitrations because the "consent of you" language was arguably inconsistent with multiple claimants. Bazzle, 539 U.S. at 450.

The arbitration clause in the Agreement contains "sweeping language concerning the scope of the questions committed to arbitration," id. at 453, as it commits to arbitration *"[a]ny* claim or controversy arising out of or *related to this Agreement or the interpretation thereof."* (Emphasis supplied.) Vaughn claims that because the arbitration clause states that the contemplated arbitration will use the "rules of the New York Stock Exchange, Inc., or the National Association of Securities Dealers, Inc.," and those rules do not permit class action arbitrations, the parties could not have intended that the class action he now brings would be arbitrated. This interpretation, however, contradicts the clear statement that the arbitration clause applies to "any" claim or controversy related to the Agreement. Even assuming that Vaughn is right, and the applicable arbitration rules do, indeed, forbid class action arbitrations under all circumstances, it would be plausible to interpret the arbitration clause to require all claims to be arbitrated and to disallow class actions with no further qualifications or caveats. Here, as in *Bazzle,* the question is "not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter,"* but rather "what *kind of arbitration proceeding* the parties agreed to." Bazzle, 539 U.S. at 452 (emphasis in original). This question "concerns contract interpretation and arbitration procedures," and is therefore "for the arbitrator, not the courts, to decide." Id . at 453. The Prudential Defendants' motion to compel arbitration is accordingly granted.[FN2]

FN2. The defendants argue that the Complaint fails to state a claim for a RICO violation, and therefore, there is no basis for federal subject matter jurisdiction. Because the Complaint has a RICO claim that on its face is "neither clearly immaterial and made solely for the purpose of obtaining jurisdiction nor wholly insubstantial and frivolous," Lyndonville Sav. Bank & Trust Co. v. Lussier, 211 F.3d 697, 701 (2d Cir.2000), there is subject matter jurisdiction over this action as of now.

2. The Leeds Defendants

*4 The common law doctrine of estoppel may bind a nonsignatory to an arbitration agreement. JLM Indus., 387 F.3d at 177. *See also* Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co., 271 F.3d 403, 404, 406 (2d Cir.2001); Thomson-CSF, S.A. v. Am. Arbitration Assoc., 64 F.3d 773, 776 (2d Cir.1995); Camferdam v. Ernst & Young Int'l, Inc., No. 02 Civ. 10100(BSJ), 2004 WL 307292, at *6 (S.D.N.Y. Feb. 13, 2004).

[U]nder principles of estoppel, a *non-signatory* to an arbitration agreement *may compel a signatory* to that agreement *to arbitrate* a dispute where a careful review of the relationship among the parties, the contracts they signed, and the issues that had arisen among them discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.

JLM Indus., 387 F.3d at 177 (citation omitted) (emphasis supplied). *See also* Denney v. BDO Seidman, L.L.P., 412 F.3d 58, 70 (2d Cir.2005); Contec, 398 F.3d at 209; Choctaw, 271 F.3d at 406.

The Leeds Defendants argue that under this standard, they may compel Vaughn to arbitrate his claims against them, because he alleges a close relationship, in the form of a conspiracy, between both sets of defendants, and because the claims Vaughn raises against the Leeds Defendants are intertwined with the Agreement. Vaughn concedes that his claims against the Leeds Defendants are related to the Agreement, but argues that the relationship between the Leeds Defendants and the Prudential Defendants was not close enough to warrant estoppel in this case, because they did not have a relationship with each other independent of Vaughn's alleged conspiracy.

Vaughn's argument misconstrues the governing legal standard. The Second Circuit has held that a claim against an alleged coconspirator may not "*always* be intertwined to a degree sufficient to work an estoppel," and that "[t]he inquiry remains a fact-specific one." JLM Indus., 387 F.3d at 178 n. 7 (emphasis supplied). Nonetheless, "[a]pplication of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Denney, 412 F.3d at 70 (quoting *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir.2000)). In a putative class action where the plaintiff taxpayers accused an accounting firm and a bank, among others, of conspiring to lure them into participating in unlawful tax shelter schemes, and the plaintiffs had an arbitration agreement with the accounting firm but not the bank, the Second Circuit held:

Having alleged in this RICO action that the [nonsignatory bank] and [signatory accounting firm] defendants acted in concert to defraud plaintiffs, and that defendants' fraud arose in connection with [the accounting firm's] tax-strategy advice, plaintiffs cannot now escape the consequences of those allegations by arguing that the [bank] and [accounting firm] defendants lack the requisite close relationship, or that plaintiffs' claims against the [bank] defendants are not connected to [the bank's] relationship with the accounting firm].

*5 Denney, 412 F.3d at 70 (citation omitted). Vaughn's basic premise that Second Circuit precedent requires that the defendants have a close relationship independent of the alleged conspiracy is consequently incorrect. FN3

FN3. To the extent that Vaughn cites district court opinions that predate *Denney* for the proposition that a close relationship independent of the alleged conspiracy is required for a "close relationship," this Court respectfully declines to follow them. *See In re Currency Conversion Fee Antitrust Litig.*, 361 F.Supp.2d 237, 264 (S.D.N.Y.2005); *Orange Chicken, LLC v. Nambe Mills, Inc.*, No. 00 Civ. 4730(AGS), 2000 WL 1858556, at *5 (S.D.N .Y. Dec. 19, 2000).

Vaughn contends that the Leeds Defendants had a complex scheme to settle employment discrimination claims *en masse*, and that this scheme involved capping liability for employers such as the Prudential Defendants in exchange for direct payment of attorney's fees by the employers. He alleges that his employment discrimination claim was swept up by this scheme because the Leeds Defendants had a comprehensive, secret agreement with the Prudential Defendants to process his claim, among others, and that this agreement adversely affected the settlement of his claim. These allegations of civil RICO conspiracy involve close cooperation and collusion between Vaughn's employer and his lawyers. This theory of liability has been described elsewhere as one that "can only succeed" if the plaintiff proves his "allegation that all Defendants conspired and acted together." *Camferdam*, 2004 WL 307292, at *7.FN4 Vaughn therefore alleges precisely the type of "substantially interdependent and concerted misconduct" that estops him from avoiding arbitration of his claims with the Leeds Defendants. Denney, 412 F.3d at 70 (citation omitted). The Leeds Defendants' motion to compel arbitration is therefore granted.

FN4. In *Camferdam*, where the district court required taxpayers who had arbitration agreements with an accounting firm, and who were suing the accounting firm and a nonsignatory law firm for conspiring to create unlawful tax shelters on the taxpayers' behalf, to arbitrate claims against the law firm, the court also noted that the complaint alleged a "close relationship" between the entities involved, because "[a] civil conspiracy is a kind of partnership, in which each member becomes the agent of the other." *Camferdam*, 2004 WL 307292, at *6 (citation omitted).

CONCLUSION

The defendants' motions to compel arbitration are granted. The case is stayed until the resolution of the arbitration proceedings and is transferred to the Court's suspense docket.

SO ORDERED:

S.D.N.Y.,2005.
Vaughn v. Leeds, Morelli & Brown, P.C.
Not Reported in F.Supp.2d, 2005 WL 1949468 (S.D.N.Y.)